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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. OSCAR CHARLES WALTON CLARK, Defendant and Appellant.	E054851 (Super.Ct.No. RIF10004969) **OPINION**

APPEAL from the Superior Court of Riverside County. Bernard Schwartz, Judge. Affirmed.

Mark D. Johnson, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

INTRODUCTION

On July 12, 2010, an information was filed alleging that defendant and appellant Oscar Charles Walton Clark committed child abuse under Penal Code section 273a,

subdivision (a), a felony.[1] The information also alleged that defendant inflicted great bodily injury on a child under the age of five under section 12022.7, subdivision (d).

On August 2, 2011, jury trial commenced. On August 11, 2011, the jury found defendant guilty and the enhancement to be true. On September 9, 2011, the trial court sentenced defendant to state prison for nine years: the midterm of four years for violating section 273a, subdivision (a) and the midterm of five years for the section 12022.7, subdivision (d) enhancement.

On October 27, 2011, defendant filed a timely notice of appeal.

STATEMENT OF FACTS

In June 2010, defendant and his girlfriend, A.Y., lived together with their children, John Doe and K. John Doe had been born the previous August.

Around mid-May, 2010, John Doe showed symptoms typical of an ear infection. He was taken to his regular doctor, Dr. DiSilva, who prescribed antibiotics. The antibiotics appeared to help. However, a few days after Doe finished taking the antibiotics, the symptoms returned. Defendant took Doe back to the doctor on June 1, 2010; a stronger antibiotic was prescribed.

The following day, June 2, Doe started to vomit and act lethargic. A. took Doe back to the doctor. A. took Doe back to Dr. DiSilva again on June 8 because he was still lethargic and vomiting. She was told to take Doe to the emergency room at Corona Regional Hospital.

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[1] All statutory references are to the Penal Code unless otherwise specified.

On June 10, 2010, the staff at Corona Regional Hospital determined that Doe had low-blood sodium; Doe began to have seizure-like symptoms after vomiting. He was transferred to Loma Linda Hospital.

At Loma Linda, a CT scan revealed fluid in Doe's brain. Therefore, Dr. Mark Massi, a forensic pediatrician, was asked to examine him. Dr. Massi testified as a percipient witness about the injuries he observed on Doe and as an expert witness on the causes of the injuries.

According to Dr. Massi, further testing at Loma Linda showed blood around the entire surface of the right side of Doe's brain, or a subdural hematoma, and blood in between the front and back sections of the brain. Numerous collections of blood were found in the retinas of Doe's eyes. These were the result of trauma associated with the rapid acceleration and deceleration of the head.

Doe also had elevated choline levels, which were symptomatic of ruptured or injured nerve cells, otherwise known as brain shearing. Shearing is associated with "acceleration/deceleration injury," which Dr. Massi described as "[s]haking or slamming, something of that nature . . . ."

Additionally, Doe had a short-lived elevation of ALT enzyme produced by the liver, which was likely caused by a blunt injury or blow to his liver. He also had elevated myoglobin levels in his blood, which Dr. Massi associated with muscle injury.

Furthermore, X-rays and scans showed that Doe had a fracture on the back of his skull, a fractured rib, fractures of the radius and ulna in his right arm, and a broken finger

on his left hand. The skull fracture was caused by a significant impact, such as a blow with a fist or an object or slamming the child down; it was not caused by a mere fall. The fractures to the radius, ulna, and finger were "buckle fractures," meaning that the bones had been bent until they broke. The force required to cause such injuries was "a force much greater than what the child should experience during normal daily activities of childcare." The rib fracture was likely the result of a direct blow or squeezing.

Dr. Massi opined that the injuries were not caused by "nonaccidental trauma." His ultimate conclusion was that Doe "suffered an abuse head trauma and skeletal or bony injuries as a result of abuse."

Dr. Massi dated the injuries he observed on June 10, 2010, as follows: (1) skull fracture—one week to two months old; (2) subdural hematoma—between several days and one month old; and (3) other fractures—two to four weeks old. The liver injury that caused the elevation in the ALT enzyme levels occurred "within a few days of June the 8th."

Dr Massi testified that they found no evidence that Doe had any condition that would have caused him to be unusually susceptible to the injuries he sustained.

On June 11, 2010, defendant and his girlfriend were interviewed by law enforcement at Loma Linda Hospital. Recordings and transcripts of the interview were admitted into evidence at trial.

During defendant's interview, the interviewing officers repeatedly told defendant that the medical staff needed to know how Doe sustained his injuries so they could determine how to best treat him.

Defendant stated that only he and A. had cared for Doe in the past few weeks and that Doe's injuries had to have been caused by one of them. Defendant was adamant that A. did not cause Doe's injuries. He stated that she "would be the last person" to injure him.

Defendant told the officers that he had an anger management problem; he experienced instances of rage that sometimes caused him to black out. He agreed that, because of the blackouts, it was "a possibility [that he] did these things to [his] son[.]" He also agreed that if he had attended anger management classes two weeks earlier, there was a good chance he would not be at Loma Linda on June 11, 2010.

Defendant stated that "maybe there's a time where I did something a little bit stronger than I believe I could have or should have, and it was negative results from that." Defendant stated that he could have held Doe more firmly than he should have, and he could have pushed on his chest with his thumbs. Defendant stated that he "could see [him]self" slamming Doe down. He explained that it could have been when he changed Doe's diaper because he was frustrated when Doe threw up on him. "That must have been the time I slammed him down" on the carpet. Doe vomited shortly after that.

A. confirmed that defendant had an anger problem, and he sometimes blacked out as a result of getting angry. She also confirmed that none of the other people who sometimes cared for Doe had done so in the preceding two or three months.

A recording and transcript of a conversation between defendant and A. that took place at the hospital shortly after defendant was interviewed, were also admitted into evidence. According to the transcript, defendant said, " . . . I think I even caused a lot of this shit." Then, to one of the officers who was present, defendant stated, " . . . I may have done some thing, you know, a little bit more stronger than anything. You know, a little more, that had more drastic effect that I thought they could have." (*Sic*.)

The only defense evidence was defendant's testimony. Defendant testified that he could not think of any scenario under which he caused Doe's injuries. He testified that the term "slammed down" came from the detectives. When defendant used that term, it was to describe putting Doe down in "an aggressive manner" but not with enough force to cause injury. Defendant was told that his son would not get treatment until they determined what caused Doe's injuries. Defendant, therefore, "did his best to provide some sort of explanation so he could get moved up on, I guess, the waiting list or whatever it was."

ANALYSIS

After defendant appealed, and upon his request, this court appointed counsel to represent him. Counsel has filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738 setting forth a statement of

the case, a summary of the facts, and potential arguable issues and requesting this court to undertake a review of the entire record.

We offered defendant an opportunity to file a personal supplemental brief, and he has done so. Pursuant to the mandate of *People v. Kelly* (2006) 40 Cal.4th 106, we have independently reviewed the record for potential error.

In his 10-page handwritten supplemental brief, defendant argues that (1) his pretrial statement at the hospital is inadmissible under *Miranda*,[2] and the trial court erred in denying his motion to suppress the statement; and (2) he received ineffective assistance of counsel (IAC). Pursuant to the mandate of *People v. Kelly* (2006) 40 Cal.4th 106, we have independently reviewed the record for potential error.

We first address defendant's *Miranda* argument. On August 4, 2011, defendant filed a motion to suppress the statement he made to the officers during the interview conducted at the hospital on June 11, 2010; he argued that it was a custodial interrogation, and he was not advised of his *Miranda* rights. At the conclusion of the hearing on the motion, the trial court denied the motion.

When considering a claim that a statement was inadmissible at trial because it was obtained in violation of the *Miranda* rights, the scope of review is well established. In evaluating a challenge to the trial court's ruling on a motion to suppress evidence, we view the record in the light most favorable to the trial court's ruling and defer to its

[2] *Miranda v. Arizona* (1966) 384 U.S. 436.

factual findings, whether express or implied, if they are supported by substantial evidence. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1033.) The reviewing court then independently determines whether the challenged statement was obtained in violation of *Miranda*. (*People v. Farnam* (2002) 28 Cal.4th 107, 178.)

"No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." (U.S. Const., 5th Amend.) "[W]hen an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege . . . ." (*Miranda v. Arizona*, *supra*, 384 U.S. at pp. 478-479.) These procedural safeguards include a police advisement that the individual has the right to remain silent; that anything he says may be used against him in a court of law; that he has the right to the presence of an attorney; and that if he cannot afford one, one will be appointed to him free of charge. (*Id*. at p. 479.)

Defendant contends that the court erred when it concluded he was not in custody for purposes of *Miranda*.

The advisement of *Miranda* rights is only required when a person is subject to custodial interrogation. (*People v. Mickey* (1991) 54 Cal.3d 612, 648; *People v. Mosley* (1999) 73 Cal.App.4th 1081, 1088.) Custodial interrogation has two components. First, the person being questioned must be in custody. The second component is obviously interrogation. (*Mickey*, at p. 648; *Mosley*, at pp. 1088-1089.)

"The phrase 'custodial interrogation' is crucial. The adjective encompasses any situation in which 'a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' [Citation.] The noun 'refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect.' [Citation.]" (*People v. Mickey, supra,* 54 Cal.3d at p. 648; see also *People v. Mayfield* (1997) 14 Cal.4th 668, 732.) "Absent 'custodial interrogation,' *Miranda* simply does not come into play." (*Mickey,* at p. 648.)

The test for whether an individual is in custody is objective, i.e., "'[was] there a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.'" (*Thompson v. Keohane* (1995) 516 U.S. 99, 112; see also *People v. Stansbury* (1995) 9 Cal.4th 824, 830.) The determination is "whether a reasonable person in defendant's position would have felt he or she was in custody." (*Stansbury,* at p. 830.) As the United States Supreme Court has instructed, "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." (*Berkemer v. McCarty* (1984) 468 U.S. 420, 442, fn. omitted; see also *Stansbury,* at p. 830.)

An officer's focus of suspicion is "not relevant" to determining whether a suspect is in custody for purposes of *Miranda.* (*Stansbury v. California* (1994) 511 U.S. 318, 326.) "Even a clear statement from an officer that the person under interrogation is a prime suspect is not, in itself, dispositive of the custody issue, for some suspects are free

to come and go until the police decide to make an arrest. . . . (. . . [I]t is the objective surroundings, and not any undisclosed views, that control the *Miranda* custody inquiry.)" (*Id*. at p. 325.) "'[A]n officer's views concerning the nature of an interrogation, or beliefs concerning the potential culpability of the individual being questioned, may be one among many factors that bear upon the assessment whether that individual was in custody, but only if the officer's views or beliefs were somehow manifested to the individual under interrogation and would have affected how a reasonable person in that position would perceive his or her freedom to leave.' [Citation.]" (*In re Joseph R.* (1998) 65 Cal.App.4th 954, 960.)

"Courts have identified a variety of relevant circumstances [to determine custody]. Among them are whether contact with law enforcement was initiated by the police or the person interrogated, and if by the police, whether the person voluntarily agreed to an interview; whether the express purpose of the interview was to question the person as a witness or a suspect; where the interview took place; whether police informed the person that he or she was under arrest or in custody; whether they informed the person that he or she was free to terminate the interview and leave at any time and/or whether the person's conduct indicated an awareness of such freedom; whether there were restrictions on the person's freedom of movement during the interview; how long the interrogation lasted; how many police officers participated; whether they dominated and controlled the course of the interrogation; whether they manifested a belief that the person was culpable and they had evidence to prove it; whether the police were aggressive, confrontational, and/or

accusatory; whether the police used interrogation techniques to pressure the suspect; and whether the person was arrested at the end of the interrogation." (*People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1162.)

"No one factor is dispositive. Rather, we look at the interplay and combined effect of all the circumstances to determine whether on balance they created a coercive atmosphere such that a reasonable person would have experienced a restraint tantamount to an arrest." (*People v. Aguilera*, *supra*, 51 Cal.App.4th at p. 1162.) The question whether defendant was in custody for *Miranda* purposes is a mixed question of law and fact. (*Thompson v. Keohane, supra*, 516 U.S. at pp. 112-113.) We defer to the trial court's findings on disputed facts when supported by substantial evidence but independently decide if under the facts found a reasonable person would have felt he or she was in custody at the time of the interrogation. (*People v. Ochoa* (1998) 19 Cal.4th 353, 402.)

The issue in the instant case is whether defendant was in custody when he was interviewed about the injuries to his son at the hospital. When viewed objectively, the totality of the circumstances support the trial court's finding that defendant was not in custody. The questioning took place at a hospital, not a police station, a neutral location. At the time of the questioning, it was a pure investigation as to who may have caused the injuries to Doe; defendant was not a suspect. Defendant was not handcuffed. Although defendant was not told he was free to leave, he was never told he was not able to leave.

In fact, after the interview concluded, defendant left the interview room and went back to speak with A. No arrest was made at the time.

Based on the above, we find that the officers here did not say or do anything that might cause a reasonable person to believe he was in custody or otherwise deprived of his freedom, and, absent such factors, *Miranda* would not apply. Defendant's arguments to the contrary are unavailing.

We next address defendant's IAC contention. In order to establish a claim of IAC, defendant must demonstrate, "(1) counsel's performance was deficient in that it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient representation prejudiced the defendant, i.e., there is a 'reasonable probability' that, but for counsel's failings, defendant would have obtained a more favorable result. [Citations.] A 'reasonable probability' is one that is enough to undermine confidence in the outcome. [Citations.]" (*People v. Dennis* (1998) 17 Cal.4th 468, 540-541, citing, among other cases, *Strickland v. Washington* (1984) 466 U.S. 668, 687, 694; accord, *People v. Boyette* (2002) 29 Cal.4th 381, 430.) Hence, an IAC claim has two components: deficient performance and prejudice. (*Strickland*, at pp. 687-688, 693-694; *People v. Williams* (1997) 16 Cal.4th 153, 214-215; *People v. Davis* (1995) 10 Cal.4th 463, 503; *People v. Ledesma* (1987) 43 Cal.3d 171, 217.) If defendant fails to establish either component, his claim fails.

When a claim of ineffective assistance is made on direct appeal, and the record does not show the reason for counsel's challenged actions or omissions, the conviction

must be affirmed unless there could be no satisfactory explanation. (*People v. Pope* (1979) 23 Cal.3d 412, 426.)

In this case, defendant contends that his counsel rendered IAC because counsel failed to prepare for the motion to suppress and for trial, failed to interview and/or subpoena potential witnesses, and failed to encourage a settlement that would have been more favorable than sentencing after a guilty verdict by the jury. A review of the record, however, indicates that defendant's trial counsel was engaged in representing defendant during the trial. Defense counsel cross-examined all the key witnesses presented by the prosecution and presented evidence on defendant's behalf. Defense counsel also made appropriate objections to evidence and actively participated during trial. In sum, defendant cannot show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Similarly, he cannot demonstrate that counsel's alleged deficient representation prejudiced him, i.e., that there is a reasonable probability that, but for counsel's purported failings, defendant would have received a more favorable result. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 687; *People v. Dennis*, *supra*, 17 Cal.4th at pp. 540-541.)

We have now concluded our independent review of the record and found no arguable issues.

DISPOSITION

The judgment is affirmed.

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MCKINSTER
Acting P. J.

We concur:

MILLER
J.

CODRINGTON
J.